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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No.
77-1017

JAMES A. RHODES,
Petitioner

v.

ARTHUR KRAUSE, *et al.*,
Respondents

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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Petitioner, James A. Rhodes, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on September 12, 1977, granting a new trial to plaintiffs in this action.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, not officially reported, is set forth in the separately bound Appendix at pp. A1-A35.¹ The Order of the Court

¹ A single, separately bound Appendix containing the opinions below is being filed in this case and in *Del Corso v. Krause*, which seeks review of the same judgment. That Appendix will be referred to herein as "App."

of Appeals denying the petitions for rehearing and the opinion of Circuit Judge Weick, dissenting from the denial of en banc consideration, are set forth in the App. A36-A45. The District Court's Memorandum and Order overruling plaintiffs' motion for new trial and judgment notwithstanding the verdict is set forth at App. A46-A48.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on September 12, 1977. A timely petition for rehearing with suggestions for rehearing en banc was denied on October 20, 1977. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the use of excessive force in attempting to deal with a civil disturbance give persons injured thereby a cause of action under 42 U.S.C. § 1983 on the theory that they have been deprived of life, liberty or property without Due Process of Law?

2. Is the Court of Appeals' decision directing a new trial as to Governor Rhodes consistent with the limited scope of official liability authorized by *Scheuer v. Rhodes*, 416 U.S. 232?

3. (a) Does a threat to a juror in a civil action create a presumption of prejudice authorizing a Court of Appeals to itself set aside the jury's verdict on the ground that no record has been made in the trial court to rebut that presumption?

(b) If so, may the Court of Appeals set aside the verdict, although the party challenging the verdict did not, after learning of the threat, object to submitting the case to the jury without an interrogation of the juror who was threatened?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States, and 42 U.S.C. § 1983. They are reprinted in pertinent part at p. B1, *infra*.

STATEMENT OF THE CASE

I. The Complaints and this Court's Decision in *Scheuer v. Rhodes*, 416 U.S. 232.

Petitioner, James A. Rhodes, Governor of the State of Ohio, was a co-defendant below in actions brought by nine persons injured and the personal representatives of four persons killed on the campus of Kent State University on May 4, 1970. Named as defendants with Rhodes were the Adjutant General of Ohio (Sylvester Del Corso), the Assistant Adjutant General of Ohio (Robert Canterbury), a number of commissioned officers and enlisted men of the Ohio National Guard, and the President of Kent State University.

The action is now here after a trial which was held pursuant to this Court's remand in *Scheuer v. Rhodes*, 416 U.S. 232 (hereafter *Scheuer*). The Court there described the complaints (which were consolidated for trial) as follows:

"In essence, the defendants are alleged to have 'intentionally, recklessly, willfully and wantonly' caused an unnecessary deployment of the Ohio National Guard on the Kent State campus and, in the same manner, ordered the Guard members to perform allegedly illegal actions which resulted in the death of plaintiffs' decedents. Both complaints allege that the action was taken 'under color of state law' and that it deprived the decedents of their lives and rights without due process of law. Fairly read, the com-

plaints allege that each of the named defendants, in undertaking such actions, acted either outside the scope of his respective office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful powers of office." (416 U.S. at 235)

In *Scheuer*, this Court held, contrary to the District Court and to the Court of Appeals, that "dismissal [of the complaints] was inappropriate at this stage of the litigation * * *" *id.* It rejected the lower courts' theory that the actions are barred by the Eleventh Amendment; it held further that under 42 U.S.C. § 1983 the executive officers, including Governor Rhodes, do not possess absolute immunity from suit, but rather enjoy a qualified immunity, which the Court described as follows:

"These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." (416 U.S. at 247-248.)

The Court carefully chose to go no further in delineating the scope of the immunity at that stage of the record. The Court defined the issues to be litigated on remand:

"The documents properly before the District Court at this early pleading stage specifically placed in issue whether the Governor and his subordinate officers were acting within the scope of their duties under the Constitution and laws of Ohio; whether they acted within the range of discretion permitted the holders of such office under Ohio law, and whether they acted

in good faith in proclaiming an emergency and as to the actions taken to cope with the emergency so declared. Similarly, the complaints place directly in issue whether the lesser officers and enlisted personnel of the Guard acted in good faith obedience to the orders of their superiors. Further proceedings, either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint.

"We intimate no evaluation whatever as to the merits of the petitioners' claims or as to whether it will be possible to support them by proof. We hold only that, on the allegations of their respective complaints, they were entitled to have them judicially resolved." (416 U.S. at 250.)

II. The Evidence Pertaining to the Liability Issues Presented by this Petition.

Following remand, the parties engaged in extensive discovery. Although the *Scheuer* opinion did not direct a trial on the merits, motions for summary judgment were overruled. The trial, which lasted approximately fifteen weeks, established the following concerning the issues of liability presented by this Petition:

On Friday, May 1, 1970, demonstrations were held on the campus of Kent State University for the purpose of burying the United States Constitution and to protest the invasion of Cambodia by United States troops in the Vietnam war (A. 1037; 1268)². That evening, several hundred persons gathered in downtown Kent, Ohio, damaging and looting several business buildings, starting fires, and assaulting automobiles and their occupants (A. 3182-

² Throughout this petition, references to the Appendix filed in the Court of Appeals are designated (A. —). References to the Supplemental Appendix filed in the Court of Appeals are designated (S. —).

8; 3248; 3255; 3398; S. 53-55). Members of the Kent Police Department, attempting to disperse the crowd and prevent the damage, were injured (A. 3189-92).

As a result of the Mayor's own observation of the extensive damage, and discussions with members of the City of Kent police department, the Mayor, at approximately 12:30 A.M., on Saturday May 2, declared a state of civil emergency and established a curfew (A. 3397-3401; Pl. Ex. 48.). The Mayor called the Governor's office and explained the situation, but he did not then request the assistance of the National Guard (A. 3397-8). In turn, the Governor's office instructed the National Guard to investigate the conditions in the City of Kent, and the Guard sent a liaison officer to the city (A. 2677; 3269; 3406). At approximately 5:30 P.M. on May 2, the Mayor of Kent, after consultation with local law enforcement officers, did ask the Governor's office for assistance in maintaining law and order (A. 3193; 3270; 3447; 3413). The Mayor felt the city did not have sufficient forces to maintain law and order (A. 3447). After consulting with his staff, Governor Rhodes ordered National Guard units to the City of Kent to aid the civil authorities (A. 2664; 2677-9). The evidence established that the National Guard was ordered to duty in aid of civil authorities, and that, at all times, the local authorities were in control (A. 3440-1; 3450).

The violence moved from the City of Kent to the Commons area of the Kent State University Campus, where student demonstrators set fire to the University's ROTC building (A. 1012; 1274-5; 1303; 1366; 2198-2200; 3227-31). Firemen from the City of Kent, sent to fight the ROTC building fire, were assaulted by the demonstrators (A. 3229); fire hoses were slashed and destroyed (A. 1199; 1996).

Officials in charge of security at Kent State University decided help was needed to control the situation (A. 3489-90). Members of the National Guard were requested by the police department to go on campus, to maintain order and to stop looting and burning (A. 3274). Thereafter, the Ohio State Highway Patrol arrived to assist in maintaining order on campus (A. 2272; 3335; 3341-6).

Plaintiffs conceded in the court below:

"Plaintiffs concede on appeal, just as they did at trial, that these events justified the Governor's call-up of National Guard troops to assist civilian authorities in the City of Kent." (Reply Brief, p. 27)

On Sunday morning, May 3, 1970, Governor Rhodes arrived in the City of Kent, and was informed by General Del Corso that the violence was under control and order temporarily restored (A. 2283). The Governor then met briefly at the fire station with city and local law enforcement officials to be briefed on the situation as it then existed (A. 2710-13; 3415-6).

At the conclusion of this meeting, a press conference was held at the insistence of the news media (A. 3416; 2732-3). During this conference, the Governor and General Del Corso expressed their concern over the situation in the City of Kent and on the Kent State campus. The Governor assured the local officials that the National Guard would assist them in protecting their community until peace and order were completely restored (A. 2740-44; Court Exhibit 2).

Following the press conference, Governor Rhodes and General Del Corso left the City of Kent. As the Governor was leaving the Kent State University Airport, he met briefly with the President of the University, and informed him that the National Guard was on campus to help maintain peace and order and to insure that classes could continue. Governor Rhodes did not return to the

campus; he was not present on May 4, 1970, the day the shooting occurred (A. 2787-8; 2595-2600).

Later on May 3, a crowd began to form on campus despite patrols by National Guardsmen and a small number of Highway Patrolmen (A. 3346-50). The demonstrators moved to the University President's home; because of rumors that the home would be burned, the crowd was dispersed (A. 0871; 1463). A cordon of police, sheriff's deputies and Guardsmen stopped the moving mob from reaching the downtown area (A. 3200; 3285). The people were ordered to disperse because they were violating the curfew (A. 3205). Some rioters responded by rushing the police officers and Guardsmen, and assaulting them with various objects (A. 3209; 3285; 3205-8; 3358-9). Approximately eighty persons were arrested for violation of curfew (A. 3218).

At about 10:00 a.m. on Monday, May 4, 1970, General Canterbury called a meeting of city officials, local law enforcement authorities, University officials, and the Highway Patrol representative (A. 2426; 2531-33). The purposes of the meeting were to review the events of the past 24 hours, to discuss a workable curfew for both the City of Kent and the Kent State University Campus, and to determine whether the National Guard could be recalled from the community and the campus (A. 2430; 3669-70). Although General Canterbury expressed his desire to remove the troops as soon as possible, city officials expressed their concern that the troops should not be withdrawn before the situation was completely under control (A. 2507; 2609; 3292; 3423; 3670). At this Monday morning meeting, University officials reported that another mass demonstration was scheduled to be held at noon on the University Commons (A. 2430; 2612; 3671). It was decided that the rally should not be permitted (A. 2432; 3292-4; 3380; 3387; 3430-2; 3436). After leaving the Monday morning meeting, General Can-

terbury advised the commander of the troops that the Guard had been given the mission by the local authorities to disperse the scheduled student demonstration (A. 2446; 2449-50; 2530-1). The Guardsmen were formed in line in front of the burned-out ROTC building (A. 2115).

By noon, the crowd had grown to thousands (A. 1316). Persons were observed carrying bags of rocks, wearing heavy jackets and gloves and carrying gas masks (A. 0842; 0847; 2466; 3368). Some of the individuals were seen throwing stones (A. 0949-51). General Canterbury requested a member of the Kent State University Police Department to order the crowd to disperse (A. 0892-3; 2458-9). Riding in a military jeep, with a loudspeaker, the police officer ordered the people in the crowd, for their own safety, to disperse, advising them the gathering was illegal (A. 2180; S. 62). They responded to the announcement by throwing many rocks at the jeep, and shouting obscenities and anti-war slogans (A. 0936; 1015; 1187; 1999; 2223; S. 62-4). The jeep returned to the area of the ROTC building because the crowd, rather than dispersing, was rapidly growing in size and was becoming more violent (A. 2550; 3368).

Tear gas was fired (A. 2468); the demonstrators still refused to disperse, throwing the tear gas canisters and other missiles back toward the Guardsmen (A. 762; 788). Because of high winds, the tear gas was ineffective (A. 2551-3). A unit of 104 enlisted men and eleven officers prepared to disperse the crowd (A. 2482; 2551-3). Before moving across the Commons, the Guardsmen had been ordered to load and lock their weapons (A. 2115; 1712-14). Throughout their movements, the Guardsmen were struck with rocks (A. 2555).

At a point during the Guard maneuvers, some of the Guardsmen discharged their weapons. There was no order or command to fire. Immediately after the Guardsmen fired, the officers and senior enlisted men shouted, "Cease

fire", and attempted to stop the shooting (A. 2562-3). After a few seconds, the firing ceased and the Guardsmen returned to the area of the ROTC building.

* * *

Governor Rhodes, pursuant to both federal and state law, had appointed General Del Corso, a distinguished Regular Army career officer with a wide military background, to the office of Adjutant General (A. 2349-53). Under Ohio law, the Adjutant General is the chief of staff and administrative head of the Ohio National Guard. Duties of training Ohio National Guardsmen were given to and carried out by the office of the Adjutant General (A. 2680). Governor Rhodes testified without contradiction that he received reports from the Adjutant General concerning riot duty training of the National Guard, and that he had been told by a representative of the United States Department of Defense that the Ohio National Guard was doing one of the fine jobs of riot control (A. 2681-2).

III. The Jury's Verdict for Defendants, the District Court's Judgment and the Decision of the Court of Appeals.

The defendants had moved for a directed verdict at the conclusion of the plaintiffs' proof and at the conclusion of all proof. Those motions were denied and the case was sent to the jury.

The parties below had stipulated that the jury would consist of twelve members and that a vote of nine jurors would be required to reach a verdict. After five days of deliberation, the jury returned a verdict in favor of all defendants by a nine-to-three vote.³ Plaintiffs filed a mo-

³ Near the end of the trial it was reported to the District Judge that one juror had been threatened three times and assaulted on one occasion. The District Court's response to this problem, which the Court of Appeals later held to be inadequate, is described in detail in the companion Petition for Certiorari (*Del Corso v. Krause*) to which we respectfully invite the Court's attention.

tion for new trial on all issues and a motion for judgment notwithstanding the verdict on the issue of unlawful dispersal. Those motions were denied by the District Court, which thereupon entered judgment on the verdicts in favor of the defendants (App. A46-A48). Plaintiffs appealed to the Court of Appeals for the Sixth Circuit.

The Court of Appeals grouped the claimed errors into five categories: "(1) lack of substantial evidence to support the verdict, (2) violation of First Amendment rights as a matter of law, (3) numerous errors in evidentiary and procedural rulings of the district court, (4) failure to deal properly with extraneous influences on the jury and (5) errors in the court's charge to the jury." (App. A3).

The Court of Appeals reversed the judgment and directed a new trial, on the sole ground that the trial court had failed to deal properly with extraneous influences on the jury:

"... [T]he verdict was returned by a jury, at least one of whose members had been threatened and assaulted during the trial by a person interested in its outcome." (App. A3)

The Court of Appeals found no other errors prejudicial to plaintiffs. It expressly held that the verdict in defendants' favor was supported by substantial evidence (App. A19); it held also that *defendants* were entitled to a *directed* verdict on the First Amendment claims:

"In view of the uncontradicted evidence that violence accompanied assemblies of students and young people for three consecutive days in Kent and on the campus, finally subsiding at about 3:00 a.m. on May 4th, the order banning assemblies on that day did not violate the First Amendment. * * * The motion for directed verdict on the separate claims for damages

for violation of the right of peaceable assembly should have been granted. Upon another trial this claim will not be an issue." (App. A16)

In ruling on the District Court's instructions, the Court held also that the plaintiffs were not entitled to go to the jury on the theory that they had been subjected to cruel and unusual punishment in violation of the Eighth Amendment:

"One aspect of the district court's charge appears to conflict with a recent Supreme Court ruling. In the present cases the court instructed the jury that it could find for the plaintiffs under their § 1983 claim if the action of the defendants constituted cruel and unusual punishment as proscribed by the Eighth Amendment. In *Ingraham v. Wright*, [430] U.S. [651], 45 U.S.L.W. 4364 (April 19, 1977), the Court held that the Eighth Amendment was designed to protect those convicted of crimes. Where a state seeks to punish without an adjudication of guilt, 'the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.' [430 U.S. at 672, n.40.] Upon another trial separate instructions on cruel and unusual punishment should not be given." (App. A17)

The Court rejected the defendants' contention that *Giligan v. Morgan*, 413 U.S. 1 (a prior action arising out of the Kent State incident, but which sought only declaratory and injunctive relief), precluded the Court from submitting to the jury issues relating to "training, weaponry and orders of the Ohio National Guard". The Court said:

"It was for the jury to determine whether the Ohio orders and regulations, particularly with respect to use of loaded weapons in dealing with civil disturbances, represented a departure from Army regulations. If such a departure was found to exist, it was a factor to be considered in deciding the ulti-

mate issues of liability in these cases. A justiciable controversy related to training, weaponry and orders was presented." (App. A18)

The Court of Appeals rejected all of plaintiffs' other objections to the trial court's charge to the jury and to its evidentiary and procedural rulings. The defendants filed petitions for rehearing with suggestions for rehearing en banc. These petitions were denied with three judges dissenting from the denial of en banc consideration (see App. A36). Judge Weick wrote a dissenting opinion, wherein he stated:

"This is one of the most important cases ever to come before this Court for determination. It surely merited en banc consideration." (App. A37)

Judge Weick devoted the major portion of his opinion to the individual liability of Governor Rhodes, concluding that "the Governor was entitled to a directed verdict." (App. A38). Addressing himself to this Court's opinion in *Scheuer*, he observed that this Court had held only "that the District Court acted *prematurely* in dismissing the complaint and that it should have taken some evidence" (App. A40, emphasis in original), and he added that although "the plaintiffs have been fully heard" there "was not an iota of evidence offered at the trial to support" their allegations as described in this Court's quotation from their complaints.⁴ (App. A42).

⁴ Judge Weick also determined that the panel had erred in its consideration of the jury issue, and should have remanded for an evidentiary hearing on the question of jury tampering, rather than directing a new trial. (App. A44-A45).

REASONS FOR GRANTING THE WRIT

THE COURT BELOW HAS DECIDED IMPORTANT QUESTIONS UNDER 42 U.S.C. § 1983 IN A MANNER WHICH APPEARS TO BE INCONSISTENT WITH DECISIONS OF THIS COURT; IF THE QUESTIONS ARE OPEN THEY SHOULD BE DECIDED NOW.

I. The Use of "Excessive Force" in Attempting to Deal with a Civil Disturbance Does Not Constitute a Denial of Due Process Remediable Under 42 U.S.C. § 1983.

The Court of Appeals directed dismissal of plaintiffs' claims under 42 U.S.C. § 1983 insofar as they rest on an asserted denial of their rights under the First and Eighth Amendments. Nevertheless, the Court held that they were entitled to a new trial to determine whether they—or their decedents—had been deprived of life, liberty or property without due process of law. According to the Court of Appeals, the question for retrial is:

"whether excessive force was employed in attempting to deal with a civil disturbance. Both the due process claims and the pendent state claims are concerned with the basic issue of the appropriateness of the response of state officials and National Guard members to the conditions which existed and developed at the May 4th noon assembly on the Kent State Campus." (App. A20)

We submit that the Court below erred in holding that the use of excessive force to quell a civil disturbance gives rise to a Due Process claim. The Court correctly held that *Ingraham v. Wright*, 430 U.S. 651, precludes plaintiffs from relying on the Eighth Amendment, which "was designed to protect those convicted of crimes" (App. A17). The Guardsmen plainly were not seeking to punish the students for crimes; rather, they were attempting to disperse an unlawful assembly and to prevent the commission of crimes. But while the court below correctly

stated that "[w]here a state seeks to punish without an adjudication of guilt, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment (quoting *Ingraham*, 430 U.S. at 672, n.40), that holding does not aid plaintiffs here, because the defendants did not seek "to impose punishment" on them at all.

We of course do not contend that the Due Process Clause is implicated only when the state deprives a person of life, liberty or property in the course of *punishing* that person—the reach of that Clause is much broader. But it is likewise clear that the Clause does not reach all conduct by the state or its employees which deprives an individual of life, liberty or property. The recent precedent in point is not *Ingraham*, but *Paul v. Davis*, 424 U.S. 693, where the Court rejected the contention "that the Fourteenth Amendment's Due Process Clause should *ex proprio vigore* extend * * * a right to be free of injury wherever the State may be characterized as the tortfeasor." (*Id.* at 701).

The Court reasoned:

"* * * such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the 'constitutional shoals' that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law. *Griffin v. Breckenridge*, 403 U.S. 88, 101, 102 (1971); *a fortiori* the procedural guarantees of the Due Process Clause cannot be the source for such law." (424 U.S. at 701).

Indeed, the *Paul* opinion appears to have anticipated the precise problem in this case:

"If respondent's view is to prevail, a person arrested by law enforcement officers who announce that they believe such person to be responsible for a par-

ticular crime in order to calm the fears of an aroused populace, presumably obtains a claim against such officers under § 1983. And since it is surely far more clear from the language of the Fourteenth Amendment that 'life' is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under § 1983." (424 U.S. at 698).

Even as mistaken or negligent shooting does not give rise to a "Due Process" claim, neither does an allegation that peace officers used "excessive force" bring into play "the procedural guarantees of the Due Process Clause" (*id.* at 701). Such misconduct simply has nothing to do with the *procedural* guarantees of the Fifth and Fourteenth Amendments. On this point, too, the court below misread *Ingraham v. Wright*, for the issue which this Court decided under the Due Process Clause was not whether the paddling of students was "excessive", but whether some kind of hearing was required before corporal punishment was inflicted. Unlike the petitioners in *Ingraham*, plaintiffs here do not claim that they were entitled to some kind of hearing before the Guardsmen fired; it is precisely because any such requirement would be incongruous in this context that the Due Process Clause has nothing to do with plaintiffs' claim.⁶

We submit that certiorari should be granted to achieve compliance with the *Paul* precedent, to eliminate confusion concerning the meaning of *Ingraham*, and to ob-

⁶ If an analogy were to be drawn between plaintiffs' situation and the school context of *Ingraham*, the truly parallel situation would be the forceful intervention by one or more teachers in a fight between students or a similar disturbance; nothing in this Court's opinion or those of the dissenting Justices suggests that a Due Process question would arise under those circumstances.

viate the necessity of another trial on plaintiffs' federal claims. Moreover, if *Paul* left open the question whether the use of "excessive force" in stopping the commission of an offense is a Due Process violation actionable under § 1983, that question should be settled now. For the federal courts to entertain such actions, and establish standards of "excessiveness" in the performance of this basic police function, would cut deeply into state prerogatives, contrary to the principle of Federalism which governed decision in *Paul* and in *Rizzo v. Goode*, 423 U.S. 362.

It is precisely these considerations which led the Second Circuit to reject the claim that "a civil rights action lies, under 42 U.S.C. § 1983, against a police officer who, in the course of his duty, shoots and kills a person who has committed a felony and is trying to escape arrest." *Jones v. Marshall*, 528 F.2d 132, 133 (C.A. 2). The Court declined to allow such an action, even where the escapee's crime "did not involve conduct threatening use of deadly force" and there was not, "at the time of the shooting substantial risk that the person fleeing arrest would cause death or serious bodily harm to anyone if his apprehension were delayed." *Id.*⁷

A majority of the Eighth Circuit took the opposite view in *Mattis v. Schnorr*, 547 F.2d 1007 (C.A. 8, en banc, 4-3 decision), which was vacated and remanded by

⁷ In a thoughtful opinion, which was plainly sympathetic to the plaintiffs' objections to the State's rule that the use of deadly force was privileged, Judge Oakes wrote:

"Here we are dealing with competing interests of society of the very highest rank—interests in protecting human life against unwarranted invasion, and in promoting peaceable surrender to the exertion of law enforcement authority. The balance that has been struck to date is very likely not the best one that can be. In an area where any balance is imperfect, however, there must be some room under § 1983 for different views to prevail." (528 F.2d at 142).

this Court because there was no case or controversy, *Ashcroft v. Mattis*, 431 U.S. 171. If there is a difference between the issue in this case and that in *Jones and Mattis*, it is that the State's interest is even greater in stopping the commission of an offense than in apprehending an escapee; by a parity of reasoning it is all the less appropriate for the federal courts to compel adherence to their views of policy on the permissible degree of force "employed in attempting to deal with a civil disturbance" (App. A20) or other offense in progress.

II. On This Record Governor Rhodes Is Entitled to Judgment.

In the initial paragraphs of its opinion, the Court of Appeals noted that this Court, in *Scheuer*, had "discussed the doctrine of executive immunity and its application in actions based on 42 U.S.C. § 1983 where it is claimed that state officials have misused power which they possess by reason of positions which clothe them with the authority of state law." But the Court of Appeals did not elaborate on that standard or discuss the specific immunity issues which this Court defined in *Scheuer*: "whether the Governor and his subordinate officers were acting within the scope of their duties under the Constitution and laws of Ohio; whether they acted within the range of discretion permitted the holders of such office under Ohio law and whether they acted in good faith both in proclaiming an emergency and as to the actions taken to cope with the emergency so declared." (416 U.S. at 250).

Scheuer held that those issues could not be resolved on the pleadings; but the converse of that holding was that if those issues were resolved in the Governor's favor he would be immune from liability. The Court of Appeals therefore had the duty, before subjecting the Governor to a second trial, to consider whether the plaintiffs had presented sufficient evidence to create a jury question against the Governor on any of the foregoing theories

of liability. We submit that if the Court of Appeals had undertaken that task it necessarily would have concluded that the Governor is entitled to dismissal.

Plaintiffs' concession that the Governor's call-up of the National Guard to assist civilian authorities in the City of Kent was justified (see p. 7, *supra*) takes out of the case any claim of liability for "proclaiming an emergency" (416 U.S. at 250). Turning to "the actions taken to cope with the emergency so declared" (*id.*), the decision to ban campus assemblies is removed as a basis for liability by the Court of Appeals' conclusion that this order was constitutional. And, of course, the Governor did not direct the deployment of the National Guardsmen when they appeared on campus to disperse the crowd or give the order to lock and load weapons (see p. 9, *supra*). Thus, no question of his authority, discretion or good faith with respect to those actions arises.

In sum, as Judge Weick observed below, "there was not an iota of evidence offered at the trial to support" the allegations of the complaints which were reinstated in *Scheuer* (A42). The majority's direction of a new trial without even addressing the question of the Governor's personal liability deprives him of an important benefit of his *Scheuer* immunity.⁷ It is also, we submit, a

⁷ The Court below dealt with the individual liability of only one defendant:

"The defendant White, president of Kent State, had no control over the actions of the National Guard. Since his participation in the decision to ban the May 4 assembly did not violate rights of the plaintiffs, there is no theory under which he could have been liable to the plaintiffs. Upon remand the district court will dismiss all claims against this defendant." (App. A16)

The Governor had "control over the actions of the National Guard" on the day of the shooting only in the sense that, as its Commander-in-Chief, he had legal authority to direct those actions. But to predicate liability against him on that theory—which the Court of Appeals did not articulate—would potentially subject all governors to liability for the constitutional violations of their subordinate officers. See pp. 20-21, *infra*.

serious neglect of the Court of Appeals' responsibilities: While 42 U.S.C. § 1983 renders high state officers answerable in federal courts, those courts should not permit actions against them to be maintained after the plaintiffs have had the opportunity to establish facts to defeat their immunity, but have failed to do so; due regard for the interests of the officers, and of the State they serve, requires that interference with the defendants' performance of their official duties be thus minimized. This Court should review the Court of Appeals' refusal to dismiss the claims against the Governor because the decision below disserves the interests of Federalism and is inconsistent with the law of the case as established in *Scheuer*.

The decision below should be reviewed also because of its great importance in the development of the law under 42 U.S.C. § 1983. When this case was first here, the Court said:

"These cases, in their present posture, present no occasion for a definitive exploration of the scope of immunity available to state executive officials nor, because of the absence of a factual record, do they permit a determination as to the applicability of the foregoing principles to the respondents here." (416 U.S. at 249).

Now, however, there has been a full-blown trial of fifteen weeks duration. Thus, if an argument can be made that what was already decided in *Scheuer* is insufficient to establish the Governor's immunity, this case offers an unusually informative record for elaboration of the principles declared in *Scheuer*. It is a question of great and recurring significance whether, and, if so, under what circumstances, liability under § 1983 can be imposed on the highest official in the chain of executive authority—be it the Governor of a State or Mayor of a City. Such an official is an attractive and obvious target in any action under § 1983 for constitutional violations by any of his subordinates, who will often be judgment proof.

The question is squarely presented on this record. The Court of Appeals' divergent treatment of Governor Rhodes and Kent State University's President White can be explained, if at all, only on the theory that the Governor's position gave him control over the actions of the National Guard, see p. 19, n.7, *supra*. Yet the Governor neither "direct[ed], participate[d] in, or approve[d]" the shootings which are the basis for plaintiffs' claims. Cf. *Ford v. Byrd*, 544 F.2d 194 (C.A. 5). As one commentator has observed:

"The doctrine of respondeat superior has been held generally inapplicable to the section 1983 action;¹⁰³ and most courts have been unsympathetic to the claim that higher level officers have a general duty to the public to supervise, correct, and control the actions of their subordinates.¹⁰⁴"

¹⁰³ See, e.g., *Navarette v. Enomoto*, 536 F.2d 277, 282 (9th Cir. 1976), cert. granted, 97 S. Ct. 783 (1977); *Jennings v. Davis*, 476 F.2d 1271, 1274-75 (8th Cir. 1973); *Johnson v. Glick*, 481 F.2d 1028, 1034 (2d Cir.), cert. denied, 414 U.S. 1033 (1973). But see *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), rev'd on other grounds sub nom. *District of Columbia v. Carter*, 409 U.S. 418 (1973); *Hesselgesser v. Reilly*, 440 F.2d 901 (9th Cir. 1971) (respondeat superior applicable in § 1983 action if provided for by state law); *Lewis v. Brautigam*, 227 F.2d 124 (5th Cir. 1955) (same).

¹⁰⁴ See, e.g., *Ford v. Byrd*, 544 F.2d 194 (5th Cir. 1976); *Parker v. McKeithen*, 488 F.2d 553 (5th Cir. 1974), cert. denied, 419 U.S. 838 (1974); *Johnson v. Glick*, 481 F.2d 1028, 1034 (2d Cir.), cert. denied, 414 U.S. 1033 (1973); *Delaney v. Dias*, 415 F. Supp. 1351 (D. Mass. 1976); *Ammlung v. City of Chester*, 355 F. Supp. 1300 (E.D. Pa. 1973), aff'd, 494 F.2d 811 (3d Cir. 1974). But see *Sims v. Adams*, 537 F.2d 829, 832 (5th Cir. 1976) (supervisory liability available for personal participation, breach of state law duty; notice of past culpable conduct and failure to prevent recurrence); *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1972) (supervisors liable for negligent failure to train subordinates), rev'd on other grounds sub nom. *District of Columbia v. Carter*, 409 U.S. 418 (1973).*

* Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1207 (1977).

Thus, by requiring the Governor to stand trial again despite this record, the Court of Appeals has decided an important federal question in a manner which is inconsistent with the prevailing rule in the Courts of Appeals. For this reason, also, certiorari should be granted.⁹

CONCLUSION

For the foregoing reasons this Petition for Certiorari should be granted.

Respectfully submitted,

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⁹ The issue of supervisory responsibility under § 1983 is presently before the Court in *Procunier v. Navarette*, No. 76-446, which was argued on Oct. 11, 1977.

With respect to questions 3(a) and (b) raised by this Petition we rely on the statement of Reasons for Granting the Writ with respect to the juror issues in the companion Petition, *Del Corso v. Krause*.

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in pertinent part as follows:

"* * * nor shall any person be deprived of life, liberty, or property without due process of law; * * *"

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part as follows:

"Section 1: * * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *"

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.